No. 83-195

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

DELTA FARMS RECLAMATION DISTRICT NO. 2028,
Petitioner,

vs.

SUPERIOR COURT OF THE COUNTY OF SAN JOAQUIN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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The Real Parties In Interest, Mabel Fernandez, Mary Alice Caston and Karen Denise Edwards, respectfully pray that a writ of certiorari not issue to review the judgment and opinion of the Supreme Court of the State of California entered in the above entitled case on April 4, 1983.

OPINIONS BELOW

The opinion of the Third District Court of Appeal for the State of California and the opinion of the California Supreme Court regarding this matter appear in Appendices A and B, respectively, attached hereto.

GROUNDS FOR JURISDICTION

Petitioner purports to invoke jurisdiction under 28 U.S.C. section 1257 (3).

Pursuant to Rule 22.3 of the United States Supreme Court Rules, Real Parties In Interest object to the jurisdiction of the Court. This argument is found infra at page 3.

STATUTORY PROVISIONS INVOLVED

This case involves the provisions of California Civil Code section 846, the full text of which appears in Appendix C attached hereto.

This case also involves Section 1 of the Fourteenth Amendment to the Constitution of the United States. Said Section provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Real Parties In Interest concur in the dates and other factual representations made in Petitioner's Statement of the Case. However, two matters are raised which make it incumbent upon Real Parties In Interest to elaborate upon the information presented.

First, much attention is erroneously given to the activity of decedents in the underlying state court action. The final issue is whether or not California Civil Code section 846 applies to public entities, not whether wading is a recreational activity.

The Third Appellate District of the California Court of Appeal properly held that petitioner's claim of landowner immunity under Civil Code section 846 was ineffective inasmuch as the section does not apply to public entities (Appendix A, page A-8). The California Supreme Court upheld the lower court finding that public entities are not protected by California Civil Code section 846 (Appendix B, page A-26).

The issue before the Court is not the conduct of decedents, but rather, the applicability of California Civil Code section 846 to public entities.

Finally, Petitioner argues that: "By its order of May 26, 1983, denying Petitioner's petition for rehearing, the California Supreme Court obviously rejected Petitioner's equal protection argument."[1] As will be discussed infra at pages 4-6 Petitioner did not raise the equal protection argument until it filed its petition for rehearing with the California Supreme Court.

Thus, there is nothing "obvious" about the rejection of Petitioner's equal protection argument.

REASONS FOR NOT GRANTING THE PETITION

1. Real Parties In Interest Object to the Jurisdiction of the Court to Grant the Writ of Certiorari.

Petitioner posits that the jurisdiction of the Court is invoked pursuant to 28 U.S.C. section 1257(3). That section provides in pertinent part as follows:

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[1]Petitioner's brief, page 7.

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Petitioner maintains that it has been denied the right to equal protection under the Fourteenth Amendment to the United States Constitution by virtue of the California Supreme Court ruling that California Civil Code section 846 does not provide immunity to public entities.

The equal protection argument was never briefed and argued to any court in the State of California. Prior to this petition for a writ of certiorari the singular passing reference to the equal protection argument was found exclusively in the petition for rehearing to the California Supreme Court.[2] The sole language is as follows:

> To judicially remove Delta Farms, other state 'public entities' and federal 'public entities' from 'owners' as provided by Section 856 would deny equal protection of the laws to these 'public entities'. The

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[2]Petition for Rehearing to the California Supreme Court, page 3, filed April 20, 1983, Denied without opinion May 26, 1983.

> text of Section 846 clearly includes all owners and should not be read to discriminate against state and federal 'public entities'.

An order of the higher state court, made in passing upon a petition for rehearing, which recites that "on mature consideration" the prayer of said petition is denied, does not show that the court passed on the federal questions first raised by such petition. *Forbes v. Virginia State Council* 216 U.S. 396 (Va. 1910).

In the case of *Herndon v. State of Georgia* 295 U.S. 441, 443 (Ga. 1935), the court held:

> The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. (Citations omitted.)

A review of the published opinion of the California Supreme Court (Appendix B) makes it clear that the Constitutional issue of equal protection was neither presented to nor decided upon by the state court.

It is well established that when the highest state court has failed to pass upon a federal question, the United States Supreme Court will assume that the omission was due to want of proper presentation in the state courts unless the aggrieved party can affirmatively show the contrary. *Street v. New York* 394 U.S. 576 (N.Y. 1969).

No federal question was passed upon at the state court level. Thus, there is no issue for this Court to hear. Jurisdiction should be denied.

2. Reclamation Districts Do Not Have Standing to Raise an Equal Protection Argument.

Petitioner has asserted the reclamation districts in California are not political subdivisions of the State and therefore may assert a right to equal protection under the Fourteenth Amendment.

Petitioner offers that reclamation districts are public corporations. *People v. Williams* (1880) 56 Cal. 647 provides that "It must be considered as settled in this State by the cases of *Dean v. Davis,* 51 Cal. 409, *People v. Reclamation District No. 108,* 53 Cal. 34 and other cases in this court, that a reclamation district is a public corporation." (at page 647.)

Petitioner apparently misunderstands the definition of "public corporation." In *Davis,* supra at pages 409 and 410, the court defines a public corporation as follows:

> '. . . Public corporations are formed or organized for the government of a portion of the state.' The same definition is given in Angell and Ames on corporations. 'It is generally called public when it has for its object the government of a portion of the State; and although in such a case it involves some private interests, yet, as it is endowed with a portion of political power, the term public has been deemed appropriate.' (Section 14.) Public corporations 'are the auxiliaries of the government in the important business of municipal rule.'

The court further held that while it is clear that a reclamation district is not formed or organized for the government of a portion of the state, in the broadest sense of the term, it nevertheless exercises certain governmental functions within the district. (Page 410.) In *People v. La Rue* (1885) 67 Cal. 526 the court added "that a reclamation district is a public corporation for municipal purposes." (Page 528.)

If, as Petitioner asserts, a reclamation district is a public corporation under the above stated definition, a public corporation clearly falls within the ambit of the term "political subdivision."

Petitioner in its briefs and arguments at the state court level has argued that it is entitled to certain immunities as a public entity. "Public entity" is a term of art defined by California Government Code section 811.2 (West 1980).[3]

The California Law Revision Commission Comment on this section reveals that the definition is intended to include every kind of independent political or governmental entity in the state.[4] Petitioner now assets that it is not a public entity and is entitled to certain immunities because it consists of private individuals.

Petitioner argues that because the individual landowners in the district are ultimately responsible for funding the reclamation district through the provisions of the Califor-

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[3]Government Code section 811.2: "Public entity" includes the State, the Regents of the University of California, city, *district*, public authority, public agency, and any other *political subdivision* or *public corporation* in the State. (emphasis added.)

[4]4 Cal. Law Revision Com. Rep. (1963) p. 836.

nia Water Code sections 50,000 et seq. they should be treated as individuals rather than as a public entity. It is well settled that the California Legislature has the power to form reclamation districts.[5] The statutes authorizing the formation of reclamation districts have been challenged on the ground that they impose burdensome conditions on a class of persons arbitrarily selected. However the courts regard the impositions of restrictions and conditions on landowners within a district as a sacrifice that is compensated for by the resulting advantages. Mr. Justice Field succinctly addressed a similar challenge to the validity of such a scheme of finance for an improvement of local character by stating "The rule, that he who reaps the benefit should bear the burden, must in such cases be applied." *Hagar v. Reclamation District No. 108* 111 U.S. 701 at pages 705-706 (1884).

In *Cheseboro v. Los Angeles Co. Dist.* 306 U.S. 459 (1939) the Court reiterated:

> In the absence of flagrant abuse or purely arbitrary action, the State, consistently with the federal constitution, may establish local districts to include real property that it finds will be specially benefited by drainage, flood control, or other improvements therein, and to acquire, construct, maintain and operate the same, may impose special tax burdens upon the lands benefited. (Citations omitted.)

In *Fallbrook Irrigation District v. Bradley* 164 U.S. 112, 163 (1896) the Court opined that "In such case the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on

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[5] *In Re: Madera Irrigation District* (1891) 92 Cal. 296, reh. den. 92 Cal. 341.

the part of other owners for what is declared upon the whole to be for the public benefit."

Petitioner's assertion that the reclamation district be treated as a group of private landowners is frivolous and unsupported by law.

Petitioner, at page 10 of its brief states that it is well aware the "[p]olitical subdivisions of a state may not challenge the validity of a state's statute under the Fourteenth Amendment." Citing *Williams v. Mayor and City Council of Baltimore* 289 U.S. 36, 40 (1933). The language which Petitioner has quoted does not appear anywhere in the cited case. However, *Williams* does provide that: "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." (Citations omitted, at page 40.)

Williams is controlling authority. The Court has consistently refused to find that the Federal Constitution restricts state power to design the structure of state political institutions. This policy is reflected in the cases rejecting claims arising out of the state's creation, alteration, or destruction of local subdivisions or their powers, insofar as these claims are made by the subdivisions themselves.[6] "[C]onstitutional guarantees, ordinarily, at least, are not designed to protect one arm of the state from the body of the state, but are to protect individual and corporate citizens against the state, or arms of the state." *El Paso*

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[6]See *Laramie County v. Albany County* 92 U.S. 307 (1875); *Pawhuska v. Pawhuska Oil & Gas Co.* 250 U.S. 394 (1919), *Trenton v. New Jersey* 262 U.S. 182 (1923), *Risty v. Chicago R.I. & P.R. Co.* 270 U.S. 378 (1926).

County Water Improvement District No. 1 v. City of El Paso 133 F. Supp. 894, 906 (W.D. Tex. 1955). The policy is also given effect by the denial of standing to persons seeking to challenge state action as infringing the interest of some separate unit within the state's administrative structure, a denial which precludes the arbitration by federal courts of what are only disputes over the local allocation of government functions and powers.[7]

Petitioner cannot have it both ways. It has consistently argued that as a public entity it is entitled to immunity. It now argues that because it is an entity consisting of private individuals California Civil Code section 846 should apply and Petitioner should be treated as a group of private individuals. Such a result would allow any governmental entity, including municipalities, cities and states to effectively disband at will. This is clearly not the intention of the statute.

3. The Decision of the California Supreme Court Has Legal Implications Relevant Only to the State of California.

The Court is bound to accept the interpretation of state law by the highest court of the state. *Hortonville Joint School District No. 1 v. Hortonville Ed. Ass'n.* 426 U.S. 482 (Wis. 1976), on remand 274 N.W. 2d 697.

California Civil Code section 846 is a state statute not a federal statute. The California Supreme Court has decided that the immunity provisions of the section do not apply to public entities. (Appendix B, pages A-26.)

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[7]See, e.g., *Smith v. Indiana* 191 U.S. 138 (1903), *Braxton County Court v. West Virginia* 208 U.S. 192 (1908), *Marshall v. Dye* 231 U.S. 250 (1913), *Stewart v. Kansas City* 239 U.S. 14 (1915).

In California, the law is clear, where a statute is not expressly made applicable to government, it is for the courts to determine whether the Legislature intended it to apply to government. (*People v. Centr-O-Mart* (1950) 34 Cal. 2d 702, 704.) The California Supreme Court has performed precisely this task. The Court is bound to accept this interpretation.

Petitioner correctly points out that most of the states of the union have enacted "recreational statutes". Petitioner further points out that the various states have treated the specific issue decided by the California Supreme Court differently within their own respective jurisdictions.[8]

This "different result" is entirely consistent with the inherent right of self government enjoyed by each state.

Petitioner likens the factual scenario to the judicial logic exercised in *McGee v. International Life Insurance Co.* 355 U.S. 220 (1957).[9] However, Petitioner overlooks a distinguishing fact. In *McGee* there had been a specific finding by the court of one state that an order of a court of another state was void under the Fourteenth Admendment to the United States Constitution, *Id.*, at 221. In the instant action there was neither a dispute between one state court and another nor was there a constitutional issue raised before the California Supreme Court.

In brief, the issue raised is one of state law. The fact that different states enact different legislation or that dif-

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[8]Petitioners brief, pages 14-15.

[9]Petitioners brief, page 16.

ferent high state courts may construe different state laws differently does not give rise to a constitutional issue.

The issue resolved by the California Supreme Court was one within the parameters of the state sovereign. The decision is binding only upon section 846 of the California Civil Code.

4. The General Public Is Affected Regardless of How the Issue Is Decided.

Petitioner argues that the California Supreme Court ruling, if left to stand, would affect "other states" with similar statutes.[10] While this supposition may be true, the converse also obtains. In the event that the California Supreme Court had applied the requested immunity to public entities, the very same "other states" would continue to be affected assuming that the other state chose to look to the California Court for guidance.

It is a truism that there can be no judicial construction of a statute that does not affect the public within the geographical area governed by the statute. Thus, this argument as raised by Petitioner can just as effectively be advanced by Real Parties In Interest.

Had the California Supreme Court decision been otherwise, members of the general public would be prohibited from recovering for injuries sustained as a result of a dangerous condition existing on public property.

Petitioner argues that the contested construction will result in decreased availability of land to private citizens for recreational purposes. Yet, Petitioner cites neither

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[10]Petitioners brief, page 17.

authority nor statistics for this proposition. It may very well be that the result will find an overall improvement of the quality of land available for recreational use.

5. Real Parties In Interest Should Be Awarded Sanctions Including All Costs and Attorney's Fees As a Result of the Frivolous Petition.

In an Act of May 26, 1913, effective August 10, 1913, the California legislature created the Sacramento and San Joaquin Drainage District. That district included 1,725,553 acres along the general course of the Sacramento and San Joaquin rivers, and included, particularly, an extensive area south of Stockton. It is unknown to Real Parties In Interest, at this time, whether or not the identical location is encompassed by Reclamation District No. 2028, Petitioner herein.

After the legislation of May 26, 1913, a landowner who possessed a portion of the newly formed district was assessed five cents (5¢) per acre. The landowner presented a writ of error and a petition for certiorari to the United States Supreme Court[11] arguing that the Act denied him an opportunity to show that his lands would receive no special or direct benefit from the proposed work and that the Act therefore conflicted with the Fourteenth Amendment.

The petition for certiorari was denied and the writ of error dismissed. In so ruling the Court reasoned:

> . . . Since *Houck v. Little River Drainage District,* (1915) 239 U.S. 254, the doctrine has been definitely

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[11] *Miller & Lux, Inc. v. Sacramento & San Joaquin Drainage District* 256 U.S. 129 (1921).

> settled that in the absence of flagrant abuse or purely arbitrary action a State may establish drainage districts and tax lands therein for local improvements, and that none of such lands may escape liability solely because they will not receive direct benefits. The allegations of the original complaint are wholly insufficient to raise the issue in respect of arbitrary legislative action presented by *Myles Salt Co. v. Iberia Drainage District,* 239 U.S. 478.

The Court has decided that districts, such as Petitioner herein, may be created by state action.

This Court has also ruled that the entity created has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.[12]

Thus, this Court has found that the districts can be created and that the Federal Constitution, on the facts before the Court, presents Petitioner with no privileges or immunities. The conclusion is inescapable, the petition must be denied.

Assuming that we did not have the benefit of the existing authority, it would remain true that the equal protection argument was neither presented to nor addressed by the California court. This fact as well requires that the Petition be denied.

Decedents drowned on June 23, 1979. The action was filed on January 14, 1980. Real Parties In Interest have suffered through the arduous and expensive appellate process. Now, on a date more than four years since the

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[12]Real Parties In Interest brief at page 9.

tragic loss of two children, the Petitioner has taken further steps to delay this litigation.

Petitioner was twice unsuccessful in its demurrer. It has twice been unsuccessful before the California Court of Appeal and has been twice unsuccessful before the California Supreme Court. On June 27, 1983, Petitioner unsuccessfully sought a stay of the trial court proceedings. Real Parties In Interest had no choice but to respond to each of the seven formal pleadings. Because the Real Parties In Interest have been correct, they have prevailed on each of the seven occasions.

When a petition for writ of certiorari is frivolous, the Court may award respondent appropriate damages.[13]

Where the appeal is frivolous and taken for delay, the Court has discretion to award damages for delay which may include attorney's fees[14] and costs of printing the brief and appendix.[15]

The Court should find that it is without jurisdiction to hear the petition as the issue raised was never passed upon by the California court. Even if this does not come to pass, the petition should be deemed frivolous since Petitioner, as a public entity, is barred from raising an equal protection argument.

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[13]Supreme Court Rules 49.2, 50.7; 28 U.S.C. section 1912.

[14]*Deming v. Carlisle Packing Co.* 226 U.S. 102, 110 (1912). brief and appendix.[15]

[15]*In Re: Midland United Co.* 141 F. 2d 692 (CCA 3d, 1944).

CONCLUSION

Real Parties In Interest respectfully submit that the Court does not have jurisdiction to hear the issue as posed since it was never passed upon by the California Supreme Court. Clearly, the petition is frivolous and without merit.

Finally, reclamation districts are created by virtue of state legislation which has been found Constitutional by the Court.

Once the district is created it becomes a public entity. A public entity is not protected by the equal protection provision of the Fourteenth Amendment. Thus, even if the Court had jurisdiction, the petition is frivolous and Real Parties In Interest should be awarded costs and fees.

Respectfully submitted,

LAWRENCE JAMES LESS
LEWIS & LEWIS
Counsel for Real Parties In Interest

September, 1983

MOTION TO ALLOW DAMAGES AND COSTS FOR FRIVOLOUS PETITION FOR WRIT OF CERTIORARI AND FOR DELAY

Real Parties In Interest, Mabel Fernandez, Mary Alice Caston, and Karen Denise Edwards, respectfully move the Court to deny the petition for writ of certiorari.

The grounds for this motion are that Real Parties In Interest have shown that the federal questions presented as a basis for the petition in this case are unsubstantial, have been previously foreclosed by opinions of this Court and that the petition was filed herein without any basis or reason for granting the same but merely to delay, as is more fully shown in the Real Parties In Interest's brief in response to such petition.

In the event that the petition for writ of certiorari is denied, Real Parties In Interest further move the Court to award to Real Parties In Interest reasonable damages including attorney's fees and costs against Petitioner for bringing a frivolous petition for writ of certiorari and for its delay by reason of the commencement and pendency of the proceeding in accordance with this Court's Rules 49.2 and 50.7.

Respectfully submitted,

LAWRENCE JAMES LESS
LEWIS & LEWIS
Counsel for Real Parties In Interest

September, 1983

(Appendices follow)

Appendix A

CERTIFIED FOR PUBLICATION

In the Court of Appeal of the State of California
in and for the Third Appellate District
(San Joaquin)
3 Civ. 20302
(Super. Ct. No. 148335)

Delta Farms Reclamation District No. 2028,
Petitioner,

v.

The Superior Court of the County of San Joaquin,
Respondent.

Mabel Fernandez et al.,
Real Parties in Interest.

[Filed Nov. 13, 1981]

ORIGINAL PROCEEDING; application for a writ of mandate. Writ denied.

Memering & DeMers and Henry W. Crowle, for Petitioner.

No appearance for Respondent.

Lewis, Lewis & Less, and Lawrence J. Less and Craig R. Blackstone, for Real Parties in Interest.

• • •

Petitioner, Delta Farms Reclamation District No. 2028 (Delta Farms), seeks a writ of mandate directing respondent superior court to sustain its general demurrer to real parties' complaint for damages for injuries, including emotional distress, for the wrongful death of two teenage girls who drowned in a canal owned by the district. We issued

an order to show cause. The district contends that the complaint (1) fails to state a claim under Government Code section 835, liability for dangerous conditions of public property; (2) fails to state facts avoiding the public entity immunity for reservoirs, drains, conduits and canals provided by Government Code section 831.8; (3) fails to state facts avoiding land-owner immunity against persons on property used for recreational purposes provided by Civil Code section 846; and (4) states claims for negligent infliction of emotional distress, which are barred by Government Code section 815. We deny Delta Farms the relief it seeks.

FACTS

"A demurrer admits all material and issuable facts properly pleaded. [Citations.]" (Daar v. Yellow Cab Co. (1967) 67 Cal.2d 695, 713; California State Police Assn. v. State of California (1981) 120 Cal.App.3d 674, 680.) We set out the facts accordingly.

About June 23 or 24, 1979, Paquita Hill and Cheryl Fernandez, both 15 years of age, drowned on district property in a waterway known as Middle River. The waterway is said to be in a dangerous condition, as a result of dredging by Delta Farms and others, in that it is only a foot deep five feet from the shore, at which point it plunges to a depth of 60 feet. The children, while wading, stepped off the hidden drop and drowned in view of real parties. The district knew or should have known of the dangerous condition. It also knew that visitors frequent the area of the drownings. had posted a sign limiting the hours of parking nearby and knew or should have known

that visitors are likely to wade or swim there. Nevertheless, it failed to warn real parties of the latent dangers of the river. Real parties, Mary Alice Caston (Hill's mother), Mabel Fernandez (Fernandez' mother) and Karen Denise Edwards (Fernandez' sister), witnessed the drownings and suffered emotional distress and, in addition, Edwards, who was pregnant at the time, suffered a miscarriage.[1]

I

Delta Farms asserts that real parties allege only common law claims of negligence and that negligence plays no part in the application of section 835[2] to this case. It implies that section 835 employs negligence standards only for a dangerous condition created by the negligence of a district employee (§ 835, subd. (a)) and that no liability attaches

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[1]Government Code section 815 provides: "Except as otherwise provided by statute: [¶] (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person. [¶] (b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person."

[2]Government Code section 835 provides: "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

for a negligent failure to warn of a dangerous condition which was not so created. Delta Farms misreads the statute.

Although the Tort Claims Act imposes liability only as "provided by statute" (§ 815), the statute incorporates common law concepts of liability. "The Tort Claims Act must necessarily be read against the background of general tort law. The conceptual theory of statutory liability under the act is keyed to the common law of negligence and damages . . . ." (Van Alstyne, Cal. Government Tort Liability Practice (Cont.Ed.Bar 1980) § 2.7, pp. 36-37.) Specifically, negligence concepts inform the statutory basis of liability for failure to warn of a dangerous condition of property. (§§ 835, subd. (a); 830.) Real parties predicate their action on the second ground. (See Flournoy v. State of California (1969) 275 Cal.App.2d 806, 814; and see Cameron v. State of California (1972) 7 Cal.3d 318, 327-328; § 830.)

Section 835 establishes alternate grounds of liability, put generally, where the entity either (a) wrongfully or negligently created the dangerous condition, or (b) had notice of a dangerous condition on its property and failed to take measures to protect against it. "A public entity may be held liable for a 'dangerous condition' of public property only if it has acted reasonably in creating *or* failing to remedy or warn against the condition . . . ." (Emphasis added.) (Cal. Law Revision Com. com. to § 830, 32 West's Ann. Gov. Code (1980 ed.) p. 264.) "Regardless of the availability of [an] active negligence theory [creating a danger], plaintiffs [are] entitled to go before a jury on [a] passive negligence theory, i.e., an accident

caused by the [entity's] failure to warn the public against [the] danger known to it but not apparent to a reasonably careful . . . user." (Cameron v. State of California, supra, 7 Cal.3d at p. 328, quoting from Flournoy v. State of California, supra, 275 Cal.App.2d at p. 811.)

Real parties claim that whether or not Delta Farms *wrongfully* dredged out the trap into which the children fell, it was nonetheless a dangerous condition to users of the river and the district failed to warn them of the trap. (See Van Alstyne, supra §§ 3.18-3.24, pp. 210-222.) Here, the dredging of the waterway was apparently done for a purpose unconnected with swimming or wading. But public entitles are liable "for maintaining property in a condition that creates a hazard to foreseeable useres even if those persons use the property for a purpose for which it was not designed to be used or for a purpose that is illegal." (Cal. Law Revision Com. com. to § 830, 32 West's Ann. Gov. Code, supra, at pp. 264-265.) "Public property which is not damaged or in a deteriorated condition, and which is neither structurally unsound nor physically defective may, nevertheless, be in a dangerous condition because the design or location of the improvement, the interrelationship of its structural or natural features, or latent hazards associated with its normal use, create a substantial risk of injury to foreseeable careful users." (Van Alstyne, supra, § 3.8, p. 188.)

Section 835, as applicable here, provides for entity liability where (a) the property was in a dangerous condition at the time of injury; (b) the injury was proximately

caused by such condition; (c) such condition created a reasonably foreseeable risk of injury of the kind of injury which was incurred; and (d) the entity had notice as provided in section 835.2 of such condition in time to take remedial measures. (See Warden v. City of Los Angeles (1975) 13 Cal.3d 297.) The complaint will survive a demurrer if it is factually detailed enough to support an inference that each of these statutory requirements is satisfied. It does.

The complaint sufficiently alleges the existence of a dangerous condition and that the injuries were the proximate result of the condition. The allegations of the likelihood of wading and swimming by visitors and the description of the sudden, latent, drop of the waterway's dredged bottom set forth a trap which poses a reasonably foreseeable risk of drowning to waders. (See Davis v. Cordova Recreation & Park Dist. (1972) 24 Cal.App.3d 789 ["a sump hole built into the bottom of a 'fish pond' in a public park"]; "a sump hole in a pond does not endanger those who fish from the shore but might be dangerous to waders." (Van Alstyne, supra, § 3.8, p. 188.)

Section 835.2 requires that the entity must have "actual notice of a . . . condition and knew or should have known of its dangerous character." (§ 835, subd. (a).) "Actual notice must embrace both the fact that the condition exists and that it is dangerous." (Van Alstyne, supra, § 3.21, p. 212.) "Imputed notice . . . satisfies the actual notice requirement . . . ." (*Ibid.*)

The complaint alleges that "Delta Farms knew or should have known of the dangerous condition of the waterway known as Middle River." "In the pleading of notice, a

general allegation of actual notice is ordinarily sufficient." (Van Alstyne, supra, § 3.72, p. 294, and cases cited therein.) Liberally read (Marin v. Jacuzzi (1964) 224 Cal.App.2d 549, 552), the complaint says that the district knew of the condition and that it was dangerous, which can also be inferred from the allegations that Delta Farms participated in the dredging which created the trap for waders and that it knew that persons waded in the water near the trap. Constructive notice, also provided for by section 835.2, is invoked by the allegation that the condition was permanent, or at least semi-permanent which could not possibly have escaped the district's notice for long. (Gov. Code, § 835.2.)[3]

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[3]Government Code section 835.2 provides: "(a) A public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of Section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character. [¶] (b) A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. On the issue of due care, admissible evidence includes but is not limited to evidence as to: [¶] (1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property [¶] (2) Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition."

II

Delta Farms seeks refuge in Government Code section 831.8, subdivision (b), which confers immunity on "irrigation district[s]" and the state and their employees for injuries suffered by persons using canals, conduits and drains in a manner not intended. It expressly applies only to "irrigation district[s]." (See Water Code, § 20500 et seq.)

Delta Farms is a reclamation district which is separately classified and governed. (Water Code, § 50000 et seq.) Delta Farms seeks to bring reclamation districts within the immunity for irrigation districts on the ground that reclamation districts, like irrigation districts, may acquire and maintain irrigation systems in connection with their lands. (Water Code, § 50910.) We disagree. "When the Legislature intended to limit the liability of public entities for dangerous property conditions, it did so by express language applicable to narrowly defined situations." (Van Alstyne, supra, § 3.19, p. 211; compare § 3.46, p. 263.) The immunity in section 831, subdivision (b), unlike that in section 831, subdivision (a) (for "public entities" generally), is made expressly applicable only to the state and to irrigation districts and their employees. Reclamation districts are not included.

III

The district's claim of landowner immunity under Civil Code section 846 fails because that statute does not apply to public entities. (Nelsen v. City of Gridley (1980) 113 Cal.App.3d 87.)

IV

Finally, the district contends that recovery for negligent infliction of emotional distress upon the relatives of the deceased who witnessed the drownings is not provided by statute and is thereby barred. (§ 815.)

Section 835 imposes entity liability for a "dangerous condition [which] created a reasonably foreseeable risk of the *kind of injury* which was incurred . . . ." Negligence concepts are imported by the standards of foreseeability and due care contained in sections 835 and 830. "Injury" is defined in section 810.8. (E. L. White, Inc. v. City of Huntington Beach (1978) 21 Cal.3d 497, 511.) It provides: " 'Injury' means death, injury to a person, damage to or loss of property, or any other *injury that a person may suffer to his* person, reputation, character, *feelings* or estate, *of such nature that it would be actionable if inflicted by a private person.*" (Emphasis added.) The definition is applicable both to section 835 and to the allied definition of dangerous condition in section 830. "The definition of 'dangerous condition' is quite broad because it incorporates the broad definition of 'injury' contained in Section 810.8. Thus, the danger involved need not be a danger of physical injury; it may be a danger of injury to intangible interests so long as [it] is of a kind that the law would redress if it were inflicted by a private person." (Cal. Law Revision Com. com. to § 830, 32 West's Ann. Gov. Code, supra, at p. 265.)

Under these provisions, an injury to "feelings" is compensible if it "is of a kind that the law would redress if it were inflicted by a private person." This imports a common

law meaning into the statute, a meaning which includes the injury of emotional distress.

Molien v. Kaiser Foundation Hospitals (1980) 27 Cal.3d 916 establishes the rule for private persons: emotional distress is a compensable "injury" if "the risk of [such] harm to [plaintiff] was reasonably foreseeable" to defendants. (*Id.*, at p. 923.) This test of liability meshes with section 835's requirement "that the dangerous condition [must have] created a reasonably foreseeable risk of the kind of injury which was incurred . . . ." "[T]he phrase 'kind of injury' . . . serves to define the public entity's duty by relating it to the manner in which injuries would foreseeably follow from its breach." (Van Alstyne, supra, § 3.26, pp. 224-225.)

Real parties have alleged such a foreseeable risk. As in *Molien*, the risk of emotional distress to real parties was reasonably foreseeable to Delta Farms. It is predictable that parents would accompany their children while wading in the river and that they would suffer emotional distress from witnessing their deaths by drowning. Section 835 encompasses the alleged injuries.

DISPOSITION

The petition for a writ of mandate is denied and the order to show cause is discharged. (CERTIFIED FOR PUBLICATION.)

BLEASE, J.

We concur:

PUGLIA, P. J.
REYNOSO, J.

Appendix B

S.F. 24385
In the Supreme Court
of the State of California
Delta Farms Reclamation District No. 2028,
Petitioner,
v.
The Superior Court of San Joaquin County,
Respondent;
Mabel Fernandez, et al.,
Real Parties in Interest.
[Filed April 14, 1983]

Petitioner Delta Farms Reclamation District No. 2028 (Delta) seeks mandate directing respondent superior court to sustain Delta's general demurrer to real parties' second amended complaint seeking damages for the wrongful death of two 15-year-old girls who drowned in a canal owned by the district and for personal injuries, including emotional distress.[1] Delta contends that (1) it is immune from liability for injuries resulting from the use of its canal under the provisions of Government Code section 831.8, (2) by virtue of Civil Code section 846, it was under no duty to protect against injuries or death from the recreational use of its property; (3) the cause of action for negligent infliction of emotional distress is barred by Government Code section 815, and (4) the complaint fails to state a cause of action for liability for the dangerous

[1]The inadequacy of the district's remedy by appeal was necessarily determined by the Court of Appeal when it issued an order to show cause. (People v. Superior Court (Douglass) (1979) 24 Cal.3d 428, 431; Ingram v. Superior Court (1979) 98 Cal.App.3d 483, 489-490.)

(SEE DISSENTING OPINION)

condition of public property under Government Code section 835.

"A demurrer admits all material and issuable facts properly pleaded." (Daar v. Yellow Cab Co. (1967) 67 Cal.2d 695, 713.) We seek out the facts accordingly.

On June 23 or 24, 1979, Paquita Hill and Cheryl Fernandez, both 15 years of age, drowned on district property in a waterway known as Middle River. The waterway was in a dangerous condition in that it was only a foot deep for five feet from the shore, at which point, however, it plunged to a depth of 60 feet. The girls stepped off the hidden drop while wading and drowned. The district knew or should have known of the dangerous condition. It also knew that visitors frequented the area of the drownings—it had posted a sign limiting the hours of parking nearby—and knew or should have known that visitors were likely to wade or swim there. Nevertheless, it failed to warn real parties of the latent dangers of the canal. Real parties, Mary Alice Caston (Hill's mother), Mabel Fernandez (Fernandez' mother) and Karen Denise Edwards (Fernandez' sister), witnessed the drownings and suffered emotional distress, in addition. Edwards, who was pregnant at the time, suffered a miscarriage.

I

The district contends it is immune from liability under the provisions of subdivision (b) of Government Code section 831.8. Subdivision (a) of that section provides for immunity under specified circumstances for any public entity for injuries caused by the condition of a reservoir: nothing is said about canals. Subdivision (b), by contrast,

does confer immunity for injury suffered by persons using canals, conduits, or drains; the beneficiaries of the immunity are, however, only irrigation districts, the state and their employees.[2] It is not contended that Middle River is a reservoir.

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[2]Government Code section 831.8 provides: "(a) Subject to subdivisions (c) and (d), neither a public entity nor a public employee is liable under this chapter for an injury caused by the condition of a reservoir if at the time of the injury the person injured was using the property for any purpose other than that for which the public entity intended or permitted the property to be used. [¶] (b) Subject to subdivisions (c) and (d), neither an irrigation district nor an employee thereof nor the State nor a state employee is liable under this chapter for an injury caused by the condition of canals, conduits or drains used for the distribution of water if at the time of the injury the person injured was using the property for any purpose other than that for which the district or State intended it to be used. [¶] (c) Nothing in this section exonerates a public entity or a public employee from liability for injury proximately caused by a dangerous condition of property if: [¶] (1) The injured person was not guilty of a criminal offense under Article 1 (commencing with Section 552) of Chapter 12 of Title 13 of Part 1 of the Penal Code in entering on or using the property; [¶] (2) The condition created a substantial and unreasonable risk of death or serious bodily harm when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used; [¶] (3) The dangerous character of the condition was not reasonably apparent to, and would not have been anticipated by, a mature, reasonable person using the property with due care; and [¶] (4) The public entity or the public employee had actual knowledge of the condition and knew or should have known of its dangerous character a sufficient time prior to the injury to have taken measures to protect against the condition. [¶] (d) Nothing in this section exonerates a public entity or a public employee from liability for injury proximately caused by a dangerous condition of property if: [¶] (1) The person injured was less than 12 years of age; [¶] (2) The dangerous condition created a substantial and unreasonable risk of death or serious bodily harm to children under 12 years of age using the property or adjacent property with due care in a manner

Petitioner is a reclamation district governed by the provisions of Water Code sections 50000 et seq.

Irrigation districts are separately classified and are governed by the provisions of Water Code section 20500 et seq. Petitioner claims that since it is authorized to acquire and maintain irrigation systems (Wat. Code, § 50910), it may invoke the immunity provisions of Government Code section 831.8, subdivision (b), regarding irrigation district canals. We do not agree. Since irrigation districts and reclamation districts have long been separately classified and regulated, we believe that the Legislature would have mentioned reclamation districts if it had intended the immunity provisions of subdivision (b) to apply to them.

If, as is contended, it had been the Legislature's intention to provide what Professor Van Alstyne calls "canal immunity" (Van Alstyne, Cal. Government Tort Liability Practice (Cont.Ed.Bar 1980) § 3.46, p. 263) to public entities other than the state or irrigation districts, it could easily have said so. One simple way of expressing such an intent would have been to insert the words "or canals, conduits and drains used for the distribution of water" after the word "reservoir" in subdivision (a) of section 831.8. The fact that the Legislature devoted a special subdivision to canal immunity and singled out the state and irrigation districts as the protected entities, proves conclusively that the words—"neither an irrigation district . . . nor the

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in which it was reasonably foreseeable that it would be used; [¶] (3) The person injured, because of his immaturity, did not discover the condition or did not appreciate its dangerous character; and [¶] (4) The public entity or the public employee had actual knowledge of the condition and knew or should have known of its dangerous character a sufficient time prior to the injury to have taken measures to protect against the condition."

State . . ."—of subdivision (b) must not be interpreted to mean "any public entity which owns or operates a canal."

II

The district also claims the protection of Civil Code section 846 (section 846) which limits the duty of care owed by "an owner of any estate or any other interest in real property" to persons using the property for designated recreational purposes.[3]

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[3]Section 846 now provides: "An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section. [¶] A 'recreational purpose,' as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picknicking, nature study, nature contacting, recreational gardening, gleaning, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites. [¶] An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section. [¶] This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same

Section 846 itself, which only speaks of "owners," offers little guidance on the question whether the Legislature meant to include public entities in that term.[4] On the other hand the legislative history of section 846, when considered in conjunction with other matters then before the Legislature, leaves no doubt that public entity liability was then very much on the mind of the Legislature and that, had it intended to bring such entities under the umbrella of section 846, it would have said so.

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purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner. [¶] Nothing in this section creates a duty of care or ground of liability for injury to person or property."

[4]The dissent argues that the "owners" to whom section 846 applies include the state and other public entities such as the petitioning district. It relies, inter alia, on section 669 of the Civil Code which since 1872 has read in relevant part: "All property has an owner, whether that owner is the State, and the property public, or the owner an individual, and the property private." The section —which, incidentally, applies to personal as well as real property —merely recognized that in law there is no such thing as unowned property. As such it complements section 182 of the Government Code: "All property within the limits of the State, which does not belong to any person, belongs to the people. Whenever the title to any property fails for want of heirs or next of kin, it reverts to the people."

It is, of course, impossible to quarrel with the proposition that the state can be an owner of property, but that is only the beginning of the problem in statutory interpretation which this case poses. Obviously the power of the state to own property cannot automatically lead to the conclusion that every statutory reference to an "owner" encompasses not only the state itself, but also—as relevant to this case—every public entity within the state. If that were the law, there would be no need for the rule that "[w]here a statute is not expressly made applicable to government, it is for the courts to determine whether the Legislature intended it to apply to government." (People v. Centr-O-Mart (1950) 34 Cal.2d 702, 704.)

The legislative history of section 846 (Stats. 1963, ch. 1759, § 1) shows that it was considered by the same committees of the Assembly and the Senate which, concurrently, readied the California Tort Claims Act (the Act) (Stats. 1963, ch. 1681) for consideration by the full Legislature.[5] Although section 846 became law two days after

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[5] (*Stats. 1963, ch. 1681, § 1, p. 3267* (the Act).)

"Jan. 10—Read first time. To printer. From printer. *To committee. [Judiciary.]*

Feb. 26—From committee with author's amendments. Read second time. Amended. Re-referred to committee.

Mar. 12—From committee with author's amendments. Read second time. Amended. Re-referred to committee.

Mar. 18—From committee: Amend and re-refer to committee.

Mar. 19—Read second time. Amended. To print, and re-referred to committee.

April 2—From committee: Do pass as amended, but first amend. and re-refer to Com. on Fin.

April 3—Read second time. Amended. To print, and re-referred to Com. on Fin.

April 18—From committee: Do pass as amended.

April 22—Read second time. Amended. To print, engrossment, and third reading.

April 23—Reported correctly engrossed. Passed on file.

April 24—Passed on file.

April 25—Read third time, passed, title approved. *To Assembly.*

April 26—In Assembly. Read first time. Held at desk.

April 30—Referred *to Com. on Jud.*

May 16—From committee: Do pass as amended.

May 17—Read second time. Amended. To printer. From printer. Ordered returned to second reading file.

May 20—Read second time. Re-referred to Com. on W. & M.

June 14—From committee: Do pass as amended.

June 15—Read second time. Amended. To printer. From printer. Ordered returned to second reading file.

the Act, on occasion it led the latter on their joint journey through the two houses—for example, the Senate finished its work on section 846 on June 14, while it did not concur in Assembly amendments to the Act until five days later. We mention these legislative minutiae for a reason: the

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June 17—Read second time. To third reading.

June 18—Read third time, passed, title approved. To Senate.

June 18—In Senate. To unfinished business.

June 19—Senate concurs in Assembly amendment. To enrollment.

July 1—Reported correctly enrolled. To Governor at 4:30 p.m.

July 15—Approved by Governor. Chapter 1681."

(*Stats. 1963, ch. 1759, § 1, p. 3511* (section 846).)

"Feb. 7—Read first time. To printer. From printer. *To committee. [Judiciary.]*

May 6—From committee. Do pass.

May 7—Read second time, to engrossment and third reading.

May 8—Reported correctly engrossed. Read third time, passed, title approved. *To Assembly.*

May 9—In Assembly. Read first time. Held at desk.

May 10—*Referred to Com. on Jud.*

May 23—From committee. Do pass as amended. To Consent Calendar.

May 24—Read second time. Amended. To printer. From printer. Ordered returned to second reading file.

May 27—Read second time. To Consent Calendar.

May 29—Read third time, passed, title approved. To Senate.

May 29—In Senate. To unfinished business.

June 3—Senate refuses to concur in Assembly amendments. In conference.

June 14—Senate adopts conference report.

June 21—Assembly adopts conference report. To enrollment.

July 3—Reported correctly enrolled. To Governor at 11 a.m.

July 17—Approved by Governor. Chapter 1759."

(Data taken from Cal. Leg., Final Calendar of Legislative Business (1963 Reg. Sess.), emphasis added.)

simultaneous passage of the two pieces of legislation through the same two committees and, later, both houses of the Legislature, makes it particularly appropriate that the two statutes—which, to some extent, deal with the same problem—be construed in such a way that they produce harmony rather than dissonance. (Isobe v. Unemployment Ins. Appeals Bd. (1974) 12 Cal.3d 584, 590-591.) To be specific: both statutes deal with liability to recreational users of property—section 846 does so exclusively, the Act in part. The rule of construction just adverted to commands us to avoid any interpretation of section 846 which is at odds with the provisions of the Act as far as injuries to recreational users of public property are concerned.

Actually an unbiased reading of section 846 and the relevant sections of the Act—principally sections 831.2, 831.4, 831.8 and 835 of the Government Code[6]—gives little reason to suppose that section 846 was ever intended to upset the carefully structured, comprehensive, statutory framework of the Act by including public entities among the landowners whom it protects: First, section 846 preserves the then prevailing distinction between trespassers, licensees and invitees—concepts which are foreign to the Act (Gibson v. County of Mendocino (1940) 16 Cal.2d 80, 84-85; see also O'Keefe v. South End Rowing Club (1966) 64 Cal.2d 729, 749, fn. 12; Acosta v. County of Los Angeles (1961) 56 Cal.2d 208, 212-213; Gallipo v. City of Long Beach (1958) 164 Cal.App.2d 70, 76; Van Alstyne, Cal. Government Tort Liability (Cont.Ed.Bar 1964) § 6.22,

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[6]Except for section 846, which is in the Civil Code, all statutory references are, unless otherwise noted, to the Government Code.

p. 205). Second, as we shall presently show, application of section 846 to public entities would eviscerate large portions of the Act. Third, application of section 846 to public entities would lead to some patently absurd results. One example will suffice at this point: since section 846 is by no means limited to land in its natural condition—it specifically mentions "structures"—it obviously encompasses improved streets. So, of course, does the Act. (§ 830 et seq.) Therefore, an improved but dangerously rutted street would expose a city to liability to a bicyclist who commutes to work, even though it was under "no duty" to keep the same street safe for the recreational rider right behind him.[7] We doubt that there is a single city attorney in this state who would submit such an absurdity to a court of law.

Thus, although it should have been clear from the outset that the Act and section 846 dealt with different sets of potential defendants—the former with public entities and officers, the latter with private landowners—the Courts of Appeal temporarily backed themselves into a holding that section 846 did benefit public as well as private landowners. The error is easily traceable to English v. Martin Mun. Water Dist. (1977) 66 Cal.App.3d 725 where the court—without stopping to consider that one of the two defendants was a public entity—applied section 846 against a plaintiff who, during a recreational ride, drove his motorcycle over a hidden precipice. The only legal issue discussed was the impact of Rowland v. Christian (1968) 69 Cal.2d 108 on section 846. Next, Gerkin v. Santa Clara

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[7]In what category would one put the commuter who, solely for exercise, pedals home by a circuitous route?

Valley Water Dist. (1979) 95 Cal.App.3d 1022 assumed by dictum that section 846 applied to the defendant public entity, but nevertheless reversed a summary judgment against the plaintiff, holding that she may not have used the particular property for recreational purposes—"walking" is not necessarily "hiking." Then came Moore v. City of Torrance (1979) 101 Cal.App.3d 66 which said that *English* "clearly refuted" the argument that section 846 did not apply publicly owned property—overlooking that the *English* court never adverted to the possibility of a distinction between private and public property.[8]

In sum, the precedential authority for applying section 846 to public entities rests solidly on a case which never considered the point—*English*. Actually, the first case which thoroughly canvassed the issue—Nelsen v. City of Gridley (1980) 113 Cal.App.3d 87—came to precisely the opposite conclusion: section 846 did not apply to public entities because it was irreconcilable with the provisions of the California Tort Claims Act. A brief analysis of section 846 and the relevant Government Code provisions proves that *Nelsen* is irrefutably correct and that the *English-Gerkin-Moore* line of cases must be disapproved.

The purpose of section 846 is to encourage property owners "to allow the general public to recreate free of charge on *privately* owned property." (Parish v. Lloyd (1978) 82 Cal.App.3d 785, 787; emphasis added; see also Lostritto v. Southern Pac. Transportation Co. (1977) 73

[8]There is also a dictum in Blakley v. State of California (1980) 108 Cal.App.3d 971 to the effect that even if the defendant state had owned the top of a cliff—which it did not—it would not be liable to a plaintiff who had engaged in the recreational activity of fighting before he was pushed over the edge.

Cal.App.3d 737, 747.) This purpose is achieved by a basic declaration that owners owe "no duty of care to keep the premises safe" for certain specific recreational purposes. Broadly speaking the only exceptions relate to (a) victims of wilful or malicious conduct by the owner, (b) persons who have paid consideration for permission to enter, and (c) express invitees. We note again that the statute makes no distinction between natural and artificial conditions.

The Act evinces a similar purpose to encourage public entities to open their properties for recreational use by providing for certain immunities. It goes about it, however, in radically different fashion.

The basic rule of liability for dangerous and defective public property, stated in section 835, is preceded by several immunities, some of which relate exclusively—or nearly so—to recreational activities. Thus section 831.2 declares that a public entity is not liable "for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach." The Legislative Committee Comment states in part: "It is desirable to permit the members of the public to use public property in its natural condition and to provide *trails for hikers and riders and roads for campers* . . . . But the burden and expense of putting such property in a safe condition and the expense of defending claims for injuries would probably cause many public entities to close such areas to public use." (Emphasis added.) Obviously this comment would make little sense if the public entity were already protected from claims by hikers, riders and campers by virtue of section 846.

That the Legislature did not believe that public entities were under no duty to recreational users is even more obvious if we examine section 831.4 which provides an immunity for injuries caused by unpaved roads and trails which furnish access to "fishing, hunting, camping, hiking, riding . . . water sports, recreational or scenic areas . . . ."[9] The comment indicates that the purpose of the immunity is the same as that provided by section 831.2—opening up public property for recreational use by making it financially safe to do so.

The important aspect of section 831.4 is, however, that it provides a very limited immunity against the claims of the fishermen, hunters, campers, hikers and riders: if the road which leads to the recreational area is paved or happens to be a city street—though unpaved—the immunity does not

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[9]Section 831.4 reads as follows: "A public entity, public employee, or a grantor of a public easement to a public entity for any of the following purposes, is not liable for an injury caused by a condition of: [¶] (a) Any unpaved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational or scenic areas and which is not a (1) city street or highway or (2) county, state or federal highway or (3) public street or highway of a joint highway district, boulevard district, bridge and highway district or similar district formed for the improvement or building of public streets or highways. [¶] (b) Any trail used for the above purposes. [¶] (c) Any paved trail, walkway, path, or sidewalk on an easement of way which has been granted to a public entity, which easement provides access to any unimproved property, so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of any condition of the paved trail, walkway, path, or sidewalk which constitutes a hazard to health or safety. Warnings required by this subdivision shall only be required where pathways are paved, and such requirement shall not be construed to be a standard of care for any unpaved pathways or roads."

apply and liability to hunters, campers, et al. is clearly recognized. This result simply cannot be reconciled with section 846.

Even more compelling is an analysis of section 831.8 (see fn. 2, *ante*). Subdivision (a) of that section immunizes entities from liability for the dangerous condition of reservoirs which are not used for the purpose which the agency intended or permitted. Clearly this immunity applies principally to water sports. (E.g., Cardenas v. Turlock Irrigation Dist. (1968) 267 Cal.App.2d 352; Hibbs v. Los Angeles County Flood Control Dist. (1967) 252 Cal.App.2d 166.) It is, however, subject to several exceptions stated in subdivisions (c) and (d). Subdivision (c), in essence, negates the immunity if the injured person is not guilty of criminal trespass and is victimized by a "trap" known to the entity. Subdivision (d) creates an exception in the nature of the attractive nuisance doctrine, provided the victim is less than 12 years old.

Subdivisions (c) and (d) thus amount to an express imposition of public entity liability for activities which, in their nature, are almost exclusively recreational. It is simply inconceivable that the Legislature could intend such liability to coexist with a statute, such as section 846, which negates it.

Petitioner also relies on section 815 which provides in relevant part that "except as otherwise provided by statute" liabilities of entities established by the Act are "subject to any immunity . . . provided by statute . . . and . . . subject to any defense that would be available to the public entity if it were a private person." Petitioner claims, of course, that section 846 is such an immunity or defense.

We disagree with petitioner's conclusion, for the Act does "otherwise provide." Sections 831.2, 831.4 and 831.8 are clear and express recognition that the fact that the injured party is using public property for a recreational purpose is immaterial and that where liability attaches in favor of a nonrecreational user, it will also attach in favor of the hunter, hiker, swimmer, camper and so on. These three sections, therefore, negative the applicability of section 846 to public entities.

In view of the conclusion we have just reached, we need not consider real parties' further argument that section 846 does not provide for an immunity or defense as demanded by section 815, but—more directly—negatives any duty.

Finally, we are urged to construe section 846 in accord with *Moore v. City of Torrance, supra*, because, after that decision, section 846 was amended in 1980 and the Legislature failed to avail itself of the opportunity to disavow *Moore*. (Alter v. Michael (1966) 64 Cal.2d 480, 482-483.)

Whatever force the rule relied on by petitioner may have generally as an aid to statutory construction was neutralized in this instance by the wealth of cases which had, as a matter of course, dealt with recreational injuries and deaths in the context of the Act.[10] While most of these

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[10]All of the following decisions were decided before the last amendment to section 846 in 1980: Cardenas v. Turlock Irrigation Dist. (1968) 267 Cal.App.2d 352 (swimming); Rendak v. State of California (1971) 18 Cal.App.3d 286 (hiking); Buchanan v. City of Newport Beach (1975) 50 Cal.App.3d 221 (surfing); Osgood v. County of Shasta (1975) 50 Cal.App.3d 586 (water skiing); Fuller v. State of California (1975) 51 Cal.App.3d 926 (diving); County of Sacramento v. Superior Court (Kuhn) (1979) 89 Cal. App.3d 215 (floating).

cases ended unfavorably to the respective plaintiffs, at least one—Buchanan v. City of Newport Beach, *supra*—held that the defendant city could be held liable for injuries to a surfer. If legislative reaction to appellate decisions is really as sensitive as petitioner suggests, at least one of the four amendments to section 846 which followed *Buchanan* (Stats. 1976, ch. 1303, § 1; Stats. 1978, ch. 86, § 1; Stats. 1979, ch. 150, § 1; Stats. 1980, ch. 408, § 1) should have made explicit what is contended to be implicit: that public entities are protected by section 846. We hold that they are not.

III

The district further contends that recovery for negligent infliction of emotional distress suffered by relatives who witnessed the drownings is not provided by statute and is therefore barred by section 815.[11] We disagree.

Section 835 imposes liability for a "dangerous condition [which] created a reasonably foreseeable risk of the kind of injury which was incurred . . . ." The term "injury" is defined in section 810.8 as meaning "death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings or estate, of such nature that it would be actionable if inflicted by a private person." A "dangerous condition" is defined in section 830 as meaning a "condition of property that creates a substantial . . . risk of injury when such property . . . is used with due care in a

[11]Section 815 provides in pertinent part: "Except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person."

manner in which it is reasonably foreseeable that it will be used." The Law Revision Comment to section 830 makes it clear that the injury resulting from a dangerous condition may be an emotional one: "The definition of 'dangerous condition' is quite broad because it incorporates the broad definition of 'injury' contained in Section 810.5. Thus the danger involved need not be a danger of physical injury; it may be a danger of injury to intangible interests so long as the injury is of a kind that the law would redress if it were inflicted by a private person." (32 West's Ann. Gov. Code (1980 ed.) p. 265.)

Under these provisions, an injury to "feelings" is compensable if it "is of the kind that the law would redress if it were inflicted by a private person." This imports a common law meaning into the statute which would include emotional distress.

Emotional distress is a compensable injury when inflicted by a private person if the risk of such harm to plaintiff was reasonably foreseeable to defendant. (Molien v. Kaiser Foundation Hospitals (1980) 27 Cal.3d 916, 923; Dillon v. Legg (1968) 68 Cal.2d 728, 739.) This test of liability dovetails with the requirement of section 835 that the "dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred."

Real parties have alleged such a foreseeable risk. It is predictable that adult relatives would accompany children who are wading in the canal and that they would suffer emotional distress from watching them drown. Section 835 encompasses that type of injury.

IV

The district's final contention is that the complaint fails to state a cause of action for liability under section 835 for the dangerous condition of public property. That section establishes alternate grounds of liability for injuries caused by a dangerous condition where the public entity either (a) wrongfully or negligently created the dangerous condition, or (2) had actual or constructive notice of a dangerous condition on its property and failed to take measures to protect against it. (See fn. 5, *ante*.) Real parties rely on the second ground of liability.

The district claims the complaint does not state a cause of action on this ground because the allegations of notice are inadequate. Section 835.2 sets forth what must be established for a public entity to be charged with notice of a dangerous condition: (a) actual notice is established if the public entity "had actual knowledge of the existence of the condition and knew or should have known of its dangerous character," (b) constructive notice is shown "if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character."

The complaint alleges that the district "knew or should have known of the dangerous condition of the waterway known as Middle River." The district argues the allegation is inadequate because it does not set forth any underlying facts regarding knowledge. The point is well taken as to constructive notice, which clearly requires a more detailed statement of facts than that alleged here. As to actual

knowledge, however, a general allegation is sufficient. (See Matthews v. State (1978) 82 Cal.App.3d 116; Osborne v. City of Whittier (1951) 103 Cal.App.2d 609; Allen v. City of Los Angeles (1941) 43 Cal.App.2d 65; Van Alstyne, Cal. Government Tort Liability Practice (Cont.Ed.Bar 1980) § 3.72, p. 294.) The pleading of actual notice is sufficient to withstand the district's general demurrer. (See Hitson v. Dwyer (1943) 62 Cal.App.2d 803.)

The petition for writ of mandate is denied and the order to show cause is discharged.

KAUS, J.

WE CONCUR:
BIRD, C.J.
MOSK, J.
BROUSSARD, J.
LALLY, J.*

*Assigned by the Chairperson of the Judicial Council.

Appendix C

§ 846. Permission to enter for recreational purposes

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purposes, except as provided in this section.

A "recreational purpose," as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picknicking, nature study, nature contacting, recreational gardening, gleaning, winter sports, and viewing or enjoying historical archaeological, scenic, natural, or scientific sites.

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity;

or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

Nothing in this section creates a duty of care or ground of liability for injury to person or property.